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In The
# Supreme Court of the United States

WILLIAM SHORTER, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

*On Petition for Writ of Certiorari*
*to the United States Court of Appeals for the Fourth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

A. Whether a circuit court rules contrary to the decisions of this Court by finding that, after *granting* a motion under 18 U.S.C. § 3582(c)(2), a district court lacks the authority to proceed under the advisory U.S. Sentencing Guidelines and impose a non-Guidelines sentence.

B. Whether the Fourth Circuit's decision below conflicts with the Ninth Circuit's decision in United States v. Hicks.

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## OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fourth Circuit, United States v. William Shorter, Jr., No. 08-7063, 2009 U.S. App. LEXIS 27533 (4th Cir. Dec. 16, 2009), affirming the district court, was unreported. The order regarding the motion for reduction of sentence, United States v. William Shorter, Jr., No. 98-cr-00192 (E.D. Va. June 6, 2008), was also unreported. Both decisions are found in the attached appendix.

## STATEMENT OF THE BASIS FOR JURISDICTION

The district court originally had jurisdiction under 18 U.S.C. § 3231, as the government charged William Shorter, Jr. with criminal offenses against the laws of the United States. The district court regained jurisdiction under 18 U.S.C. § 3582(c)(2), as the U.S. Sentencing Commission amended the U.S. Sentencing Guidelines, reducing the applicable base offense level and applying the amendment retroactively by listing it at U.S.S.G. § 1B1.10(c). The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as the district court entered a final judgment and Mr. Shorter timely appealed from it. This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Fourth Circuit has rendered a final decision on direct appeal.

## CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

> In all criminal prosecutions, the accused shall enjoy the right to * * * an impartial jury of the

> State and district wherein the crime shall have been committed * * *.

U.S. Const. Amend. VI.

## STATEMENT OF THE CASE

In May 1998, the Grand Jury for the Eastern District of Virginia, Alexandria Division, returned an indictment charging Mr. Shorter and others with conspiracy to possess with intent to distribute 50 grams or more of crack cocaine, and possession with intent to distribute 50 grams or more of crack cocaine. Mr. Shorter pleaded not guilty and proceeded to trial in August 1998. The jury returned a general verdict finding him guilty on the conspiracy count but acquitted him of the possession charge. The district court accepted the general verdict, set the matter for sentencing, and ordered the probation office to prepare a presentence investigation report.

The report submitted that Mr. Shorter was responsible for 748 grams of cocaine base. The report set Mr. Shorter's base offense level at 36. The report concluded that no enhancements or adjustments were proper. Thus, the total offense level was also 36. With a criminal history of IV, the suggested range of imprisonment was 262 to 327 months.

The district court held the sentencing hearing in November 1998. As a result, the Guidelines were applied as mandatory. The district court imposed a term of sentence at the low end of the range, sentencing Mr. Shorter to serve 262 months.

In March 2008, Mr. Shorter filed a motion under 18 U.S.C. § 3582(c)(2), followed by a motion and memorandum from counsel. In addition to requesting a two-level reduction as a result of Amendment 706, Mr. Shorter asked the district court to apply full sentencing protections to his case, including asking that the district court order a new presentence investigation report be prepared, and set the matter for a new sentencing hearing. Mr. Shorter wished to have the district court apply full sentencing protection to his case so that this Court's decisions since his conviction became final, including Kimbrough v. United States, 552 U.S. 85, 128 S. Ct. 558 (2007), and Gall v. United States, 552 U.S. 38, 128 S. Ct. 586 (2007), would apply prospectively to his case so that he might seek a sentence below the Guidelines range.

The district court found that the parties agreed as to the two-level reduction and granted the motion on that point. The district court did not address Mr. Shorter's request for full sentencing protection, a new presentence report, and a new sentencing hearing. Mr. Shorter timely appealed.

Mr. Shorter remains incarcerated under a sentence of 210 months.

## ARGUMENTS ADDRESSING REASONS FOR ALLOWING THE WRIT

### A. The Fourth Circuit Ruled Contrary to the Decisions of this Court by Finding that, after Granting a Motion under 18 U.S.C. § 3582(c)(2), a District court Lacks the Authority to Proceed under the Advisory U.S. Sentencing Guidelines and Impose a Non-Guidelines Sentence.

Under Supreme Court Rule 10, the Court will review a decision of a U.S. court of appeals if it conflicts with relevant decisions of the Court or decides an important question of federal law that has not been, but should be, settled by the Court. S.Ct.R. 10(c). In this case, the Fourth Circuit's ruling below decides an important question of federal law concerning the application of the advisory U.S. Sentencing Guidelines and 18 U.S.C. § 3553(a) when a district court grants a motion that results in the imposition of a new sentence. That ruling either is a decision that has not been, and should be, settled by the Court or conflicts with this Court's holdings in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), and Kimbrough v. United States, 552 U.S. 85, 128 S. Ct. 558 (2007). For these reasons, as discussed more fully below, Mr. Shorter asks the Court to grant his petition.

1. **The Fourth Circuit's Ruling Below Runs Afoul of the Court's Decisions, as the Court has Made Clear that the Advisory Guidelines Apply to All Sentencing Circumstances.**

   a. **18 U.S.C. § 3582(c)(2), United States v. Booker, and the recent guidelines amendments**

Generally the district courts may not alter a term of imprisonment once it has been imposed. See 18 U.S.C. § 3582(c). One of a handful of exceptions applies when a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the U.S. Sentencing Commission ("Commission") under 28 U.S.C. 994(*o*). When the Commission lists an amendment to the Guidelines that lowers a range of sentence as one that applies retroactively, § 3582(c)(2) empowers the district court to revisit and defendant's sentence, vacate the sentence, and impose a new sentence the defendant in light of that amendment and the lowered range. See 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10(c).

In United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), the Court found that the Guidelines could survive a sixth amendment challenge only if they were advisory and removed the provisions that made the Guidelines mandatory. Id. at 245-68. The district courts must now consider the Guidelines but also the other sentencing factors in 18 U.S.C. § 3553(a) in selecting a sentence. Booker, 543 U.S. at 264-65.

In late 2007, the Commission amended the Guidelines to call for lower base offenses levels for

offenses involving most quantities of cocaine base. See, e.g., U.S.S.G. § 2D1.1(c)(1) (Nov. 2007); Amendment 706. In light of Booker and the now-advisory Guidelines, a question arose whether a district court granting a § 3582(c)(2) motion and electing to impose a new sentence would apply the advisory Guidelines and, thereby, have the discretion to impose a sentence below the guidelines range.

The Commission attempted to avoid the question by further amending the Guidelines beyond just the two-level reduction and the retroactive application in at least three ways. First, the Commission added the declaration that a § 3582(c)(2) proceeding do "not constitute full resentencing of the defendant." U.S.S.G. § 1B1.10(a)(3) (Mar. 2008). The logic appears to have been that, by denying that the proceeding was a "full" resentencing, Booker, the Sixth Amendment, and the advisory Guidelines might not apply.

Second, the Commission amended that same subsection to limit how the newly-amended Guidelines might be applied in § 3582(c)(2) proceedings. The Guidelines now ordered that, even if the district court resentenced a defendant and even in the era of advisory Guidelines, the district court could not impose a sentence *below* the guidelines range except in the limited circumstance where the sentence was already below the guidelines range because of a variance below the Guidelines. U.S.S.G. § 1B1.10(b)(2)(A), (B) (Mar. 2008).

Third, the Commission directed district courts to apply blinders and look only at the amended guidelines section, change that section's calculation at its discretion, but affirmatively *ignore* any other part

of the sentence or any other sentencing consideration: "[T]he court shall substitute only the amendments [expressly made retroactively applicable] for the corresponding guideline provisions that were applied when the defendant was [initially] sentenced and shall leave all other guideline application decisions unaffected." Id. at § 1B1.10(b)(1) (Mar. 2008).

**b. The Fourth Circuit's rulings in United States v. Dunphy and in this case below**

Far from resolving the issues, the Commission's amendments seeking to limit district court discretion raised additional questions. For starters, because the Commission had amended the Guidelines, and because the Guidelines were themselves advisory, some wondered whether directives of an advisory guidelines system could be mandatory and remain constitutional.

The Fourth Circuit has answered, Yes. In United States v. Dunphy, 551 F.3d 247 (4th Cir. 2009), the Fourth Circuit rejected the idea that Booker prohibits the Commission from imposing mandatory guidelines limitations upon the district courts or from carving out a "sentencing" circumstance in which mandatory Guidelines remain applicable and other sentencing factors are irrelevant.

In Dunphy, the defendant had filed a motion for sentence reduction under § 3582(c)(2), asking the district court to reduce her guidelines range and sentence as a result of the recent amendments reducing her base offense level for cocaine base quantity. Dunphy, 551 F.3d at 249. Pointing to Booker, she also asked the district court to apply the advisory Guidelines and consider a sentence below the amended

guidelines range. Id. at 249-50. The district court granted the motion in part, reducing her guidelines range as a result of the amended base offense level. Id. at 249. But the district court found that, despite Booker, the Commission had limited its authority to apply the advisory Guidelines and consider a sentence below the advisory guidelines range. Id. at 250.

On appeal, the Fourth Circuit affirmed. Id. at 257. As to any Booker implications upon the Commission's attempt to limit district court authority, the Dunphy Court held that the Booker decision was inapplicable on the theory that Booker applied only "to full sentencing hearings." Id. at 253. "Nothing in Booker * * * expands the permissible extent of sentencing reductions under § 3582(c)(2)," wrote the Fourth Circuit. Dunphy, 551 F.3d at 252. "Booker thus had no direct effect on § 3582(c)(2)." Id.

In the case below, like the defendant in Dunphy, Mr. Shorter moved for reduction of his sentence under § 3582(c)(2) and asked the district court not only to reduce his guidelines range but to apply the advisory Guidelines consider imposing a sentence below the Guidelines. Mr. Shorter argued that, while U.S.S.G. § 1B1.10(b)(2)(A) appeared to prohibit the district court from sentencing a defendant below the amended guidelines range, under Booker (1) the Guidelines were not mandatory, making the Commission's directive advisory, and (2) the district court was required to employ the advisory Guidelines in all sentencing circumstances in order to avoid a sixth amendment violation. As in Dunphy, the district court granted the motion in part, imposed a lower sentence, but found that it did not have the authority to sentence Mr. Shorter below the Guidelines.

Mr. Shorter appealed. Relying upon its decision in Dunphy, the Fourth Circuit denied relief and affirmed the district court's judgment that, by amending U.S.S.G. § 1B1.10 following Booker, the Commission had effectively limited its authority to consider 18 U.S.C. § 3553(a) factors and a sentence below the guidelines range. See Appendix at 2.

**c. The Fourth Circuit's ruling below, by following Dunphy, conflicts with the Court's declarations that the Guidelines must be advisory in every sentencing context to be constitutional.**

The Fourth Circuit first rejected Booker's application here on the ground that Booker "*applies to full sentencing hearings*." Dunphy, 551 F.3d at 253 (emphasis supplied). As a threshold matter, the text of Booker does not make that statement. At no point did the Booker opinion use the phrase "full sentencing." But no matter the precise language, the Booker Court did not state that its constitutional ruling would be limited to some sentencing proceedings and not others. In fact, the opinion demonstrates the opposite.

When the government suggested something similar in Booker—that the Guidelines should be considered advisory in certain, constitutionally-compelled cases but mandatory in others, this Court flatly dismissed the notion, stating, "we do not see how it is possible to leave the Guidelines as binding in other cases." Booker, 543 U.S. at 266. "[W]e believe that Congress would not have authorized a mandatory system in some cases and a non-mandatory system in others, given the administrative complexities that such a system would create." Id. "A mandatory system is no

longer an open choice." Booker, 543 U.S. at 263; see id. at 264.

The Booker Court did not qualify its statement that a mandatory guideline regime "is not a choice that remains open," id. at 265, and never suggested, explicitly or implicitly, that the mandatory Guideline scheme survived in *any* context. And when the government later argued that the crack cocaine Guidelines could be interpreted in a way that would render it effectively mandatory, the Supreme Court made clear that all Guidelines "are advisory only." Kimbrough v. United States, 552 U.S. 85, 128 S. Ct. 558, 546 (2007).

The Fourth Circuit has recognized the Court's declarations that the Guidelines cannot be mandatory in some contexts but not in others. But to get around that hurdle, the Dunphy Court concluded that the grounds for those observations somehow did not apply to § 3582(c)(2) proceedings. Mr. Shorter submits that, regardless of the reasoning employed, the Dunphy Court has effectively reasoned itself to a result that is directly contradictory to Booker. Although Booker made clear that the Guidelines must be advisory in *all* contexts, the Dunphy Court has somehow concluded that the Guidelines are mandatory *here*.

Mr. Shorter acknowledges that sentencing protections afforded a defendant do not reach the level of those applicable at trial. See McMillan v. Pennsylvania, 477 U.S. 79, 87-88, 106 S. Ct. 2411 (1986), Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079 (1949). See, e.g., Nichols v. United

States, 511 U.S. 738, 747, 114 S. Ct. 1921 (1994). But the purpose of a § 3582(c)(2) proceedings is to impose a new sentence. See United States v. Hicks, 472 F.3d 1167, 1171 (9th Cir. 2007) ("While § 3582(c)(2) proceedings do not constitute full re-sentencings, their purpose is to give defendants a new sentence."). And when a proceeding involves the imposition of a sentence, some quantum of constitutional protection applies. See, e.g., Mitchell v. United States, 526 U.S. 314, 329, 119 S. Ct. 1307 (1999); United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589 (1972); Townsend v. Burke, 334 U.S. 736, 740-41, 68 S. Ct. 1252 (1948). After all, a term of sentence takes liberty from the citizen.

No matter the level of sentencing protection afforded a defendant through a § 3582(c)(2) motion, any time an action results in a "re-sentencing" in federal courts, the minimal protections for sentencing must apply. A court may call the proceeding what it will—but it is at least a "sentencing" or "re-sentencing" for a defendant. This view is supported by the Advisory Committee on Criminal Rules of the United States Judicial Conference, which has taken the view that § 3582(c)(2) proceedings constitute "resentencings." See Fed. R. Crim. P. 43, Advisory Committee's Note to 1998 Amendments (writing that, under § 3582(c), "a resentencing may be conducted as a result of retroactive changes to the Sentencing Guidelines by the" Commission).

No matter the level of protection afforded a defendant at a § 3582(c)(2) re-sentencing, it is still a sentencing function—the proceeding results in a sentence. In all "sentencing" proceedings, 18 U.S.C. § 3661 applies. Through § 3661, Congress directed the

district court not to limit the use of information concerning the background, character, and conduct of the defendant when considering the sentence to impose. The Commission's recent amendments and the Fourth Circuit's ruling below ignore § 3661.

Mr. Shorter further submits that any distinction between "full" and something else is illusory. No matter what a court calls the sentencing protection applicable to a § 3582(c)(2) proceeding, when the proceeding results in a new sentence, absolutely no question exists that the district court is imposing a "sentence." And when a district court is considering and imposing a sentence, Booker, the Sixth Amendment, and the advisory Guidelines apply.

It may be true that a district court that denies a § 3582(c)(2) altogether and, therefore, elects not to re-sentence a defendant, would not reach a point of being required to apply the advisory Guidelines. But when a district court grants a § 3582(c)(2) motion and chooses to impose a new sentence, that court is, by definition, "re-sentencing" a defendant. In that circumstances, the mandates of this Court would be in place to ensure that the advisory Guidelines are applied. The Commission cannot abrogate the Court's constitutional decision in Booker. See Neal v. United States, 516 U.S. 284, 290, 116 S. Ct. 763 (1996) (noting Commission cannot overrule Supreme Court statutory interpretation); Stinson v. United States, 508 U.S. 36, 38, 113 S. Ct. 1913 (1993) (noting that Guidelines commentary authoritative only when it does not violate the Constitution or a federal statute). The Commission does not exercise judicial authority. Booker, 543 U.S. at 243.

The Fourth Circuit next held that Booker did not have a "direct" effect on § 3582(c)(2). Dunphy, 551 F.3d at 252. This observation of a lack of "direct" effect may be accurate, as the Booker Court did not even mention § 3582(c)(2). But because Booker resolved a constitutional error in the Guidelines, because that resolution meant that the Guidelines must be applied as advisory, and because Booker found that the advisory Guidelines must be applied in any sentencing context, Booker certainly had an indirect effect upon all circumstances that resulted in a district court imposing a sentence, including proceedings under § 3582(c)(2).

For example, to support its decision in Dunphy, the Fourth Circuit drew analogy between § 3582(c)(2) and 28 U.S.C. § 2255. Dunphy, 551 F.3d at 255 n.5. The Dunphy Court concluded that finding that Booker did not apply to proceedings under § 3582(c)(2) was "consistent with the courts of appeals' uniform holdings that defendants whose convictions are final have no right to resentencing under Booker" under § 2255. Id.

But the Fourth Circuit is comparing apples to oranges. The Fourth Circuit may be correct that a defendant may not advance a successful substantive argument based upon Booker through a § 2255 motion that results in an order vacating his sentence.[1] This is

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[1] To be precise, circumstances exist where a defendant *may* raise a Booker issue through a § 2255 motion. Take a case in which all opening briefs are filed in a direct appeal and, two days after Booker, the court of appeals denies relief and affirms the district court's rulings. The defendant attempts to supplement the appeal in light of Booker but fails because briefing is closed. A petition for

because the Booker decision is not retroactively applicable to cases on collateral review. See 28 U.S.C. § 2255(f)(3). In other words, the § 2255 motion cannot be *based upon* Booker.

On the other hand, if a § 2255 motion succeeds (for example, if the district court rules that sentencing counsel was prejudicially ineffective) and results in vacation of the defendant's sentence, Booker would require the district court to apply the advisory Guidelines when considering the new sentence. The Fourth Circuit surely would not argue otherwise.

An accurate analogy to the § 2255 circumstance would begin with recognizing that Mr. Shorter and the defendant in Dunphy did not base their § 3582(c)(2) motions upon Booker. Instead, their motions were based upon Amendments 706 and 711 and the changes those amendments brought to their base offense levels. Only once (or because) the district court *granted* the § 3582(c)(2) motions and took the step of imposing a new sentence did Mr. Shorter and the defendant in

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rehearing fails because there is no Booker issue to "re-hear." The defendant's conviction then becomes final when this Court denies his or her petition for writ of certiorari or at the conclusion of the period for filing that petition.

That defendant may proceed with a § 2255 motion and raise Booker issues. Booker applies prospectively to the case because the appeal was pending at the time of Booker. The defendant may raise Booker issues under the cause and prejudice standard—either demonstrating that the lack of Booker issues raised in the district court or on appeal was the result of ineffective assistance of counsel or because the attorney could not be faulted for failing to predict the Booker decision. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986).

Dunphy ask the district court to apply the advisory Guidelines and consider a sentence below the guidelines range.

Mr. Shorter does not submit that a district court outright denying a § 3582(c)(2) motion would be required to apply the advisory Guidelines. This is because the district court did not engage in any "sentencing." In that limited circumstance, the Dunphy reasoning would correctly apply to find that the district court did not have authority to consider a sentence below the guidelines range.

But contrary to the Dunphy Court's reasoning, Dunphy, 551 F.3d at 255 n.5, the conclusion that Booker does not provide *grounds* for a successful § 2255 motion does not give insight as to the limitations of sentencing once a district court grants a § 3582(c)(2) motion. Instead, that a § 2255 motion cannot be *based upon* Booker shows that Booker does not provide grounds for a successful § 3582(c)(2) motion. In the same way that a successful § 2255 motion could result in the district court considering a new sentence in which the district court would be required by Booker to apply the advisory Guidelines, a successful § 3582(c)(2) motion that results in the district court considering a new sentence in which the district court would be required by Booker to apply the advisory Guidelines. The Dunphy Court's mixed comparison of the *grounds* for the motion and applicable *procedure when the a motion succeeds* obscures the real legal issue.

Again confusing the *grounds* for considering a new sentence and the *proceedings* that apply if the district court grants the defendant's request to do so, the

Dunphy Court writes, "Even before Booker, the guidelines were not mandatory in a § 3582(c) proceedings." Dunphy, 551 F.3d at 252. That is simply untrue. It is true that courts were not required to *grant* a § 3582(c)(2) motion. But this is inapposite to the question here.

The issue in Dunphy and here does not concern the district court's decision to grant or deny the § 3582(c)(2) motion. The issue before the Court only concerns the applicable procedure if and only if the district court grants the § 3582(c)(2) motion and elects to consider a new sentence. And, contrary the Fourth Circuit's statement, before Booker, the district court would have been required to apply the mandatory Guidelines. Booker did not change the district court's discretion whether to grant or deny a § 3582(c)(2) motion. Booker changed what type of Guidelines apply once the district court grants a § 3582(c)(2) motion.

In sum, the Fourth Circuit's conclusion that because Booker did not mention § 3582(c)(2) meant that Booker did not have an effect on § 3582(c)(2) proceedings is incorrect. Although Booker did not mention sentences following successful motions under 28 U.S.C. § 2255 either. The Fourth Circuit surely would not argue, however, that when a district court grants a § 2255 motion that resulted in a new sentencing hearing, the district court would not apply the advisory Guidelines.

The Dunphy Court further rejected Booker on the ground that Booker did not "expand" a district court's authority under § 3582(a)(2). But Mr. Shorter did not argue that Booker "expanded" anything. The district court's authority under § 3582(c)(2) remains the

same—to revisit a sentence when a defendant was sentenced based upon a sentencing range that the Sentencing Commission has been subsequently lowered. 18 U.S.C. § 3582(c)(2) (providing for reductions "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered"). That circumstance existed here. Mr. Shorter had been sentenced based upon a sentencing range that was subsequently lowered. Accordingly, the district court was authorized to revisit Mr. Shorter's sentence.

Again, the question here is not whether Booker expanded or effected § 3582(c)(2). The issue is not about a change to § 3582(c)(2). The Booker Court addressed what district courts may do when sentencing a defendant in all instances. The Dunphy Court was correct that Booker was not about any change to § 3582(c)(2) proceedings. But neither were the Commission's recent changes to the Guidelines.

In sum, the Guidelines limitations that the district court followed in this case to deny Mr. Shorter relief run afoul of the Court's decision in Booker. In Dunphy and in this case, the Fourth Circuit have wrongfully rejected this analysis. Mr. Shorter submits that the Fourth Circuit's opinions in Dunphy and in this case below are flawed and conflict with the Booker Court's conclusions that the Guidelines must be apply as advisory, and that those advisory Guidelines must be applied when a district court considers a sentence or new sentence for a defendant in order for the resulting sentence to be constitutional. Mr. Shorter respectfully asks the Court to grant his petition.

**B. The Fourth Circuit's Decision Below Conflicts with the Ninth Circuit's Decision in United States v. Hicks.**

Under Supreme Court Rule 10, the Court will review a decision of a U.S. court of appeals if it conflicts with a decision of another circuit on the same important matter. S.Ct.R. 10(a). In this case, the Fourth Circuit's decision that a district court granting a defendant's motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) does not have the authority to apply the advisory Guidelines conflicts with the Ninth Circuit's decision in United States v. Hicks, 472 F.3d 1167, 1171 (9th Cir. 2007). For these reasons, as discussed more fully below, Mr. Shorter asks the Court to grant his petition.

Mr. Shorter, like the defendant in Dunphy, cited the Ninth Circuit's decision in Hicks in support. Mr. Shorter submits that, contrary to the Fourth Circuit's claims in Dunphy, the Hicks decision is not rendered irrelevant after the recent changes to the Guidelines.

The only potentially material distinction between Mr. Shorter's case and Hicks is that the Commission amended U.S.S.G. § 1B1.10 to attempt to prevent a district court from reducing a defendant's sentence below an amended Guidelines range when acting under § 3582(c)(2). In other words, the Commission attempted to make the Guidelines mandatory in the context of proceedings under § 3582(c)(2). But, as noted above, that amendment itself has no effect because the Guidelines are no longer mandatory in any context. Thus Dunphy points to a distinction without a practical difference.

The Dunphy Court also writes that there would be inequity in that Booker itself is not retroactive, suggesting that it would be unfair to apply Booker and the now-advisory Guidelines to those defendants two whom Amendment 706 applies but not others. But this type of inequity of timing is ubiquitous in our legal system, and the Fourth Circuit's decisions often add to that inequity when denying relief on an issue and then later reversing itself years later.

Because of the way our legal system treats final judgments, it happens frequently that constitutional decisions are not retroactively applicable to cases in which there is a final judgment. The real anomaly would be to sentence someone today under a system that the Supreme Court declared unconstitutional back in 2005. To treat the new amended Guidelines range as mandatory just because the Commission issued a policy statement explicitly attempting to make it mandatory would be to repeat the constitutional error of the pre-Booker system of mandatory Guidelines under which this defendant originally was sentenced. When a district court has the authority to consider whether to reduce a defendant's sentence under § 3582(c)(2) as the result of a retroactive Guidelines amendment lowering a sentencing range, that sentence is no longer a "final judgment," and the post-Booker Guidelines regime—and the advisory Guidelines system—must apply.

Moreover, that Booker does not apply retroactively does *not* lead to the conclusion that the Dunphy Court appears to suggest—that the Booker remedy and the advisory Guidelines cannot apply to § 3582(c)(2) proceedings. That Booker does not apply retroactively

means that a defendant whose sentence became final before Booker cannot get into court using Booker. Although Mr. Shorter and other defendants are not happy with that rule, there is a matter of sense to it. The rules of retroactively serve the purpose of achieving finality. With Booker, the lack of retroactive application avoids a flood of new litigation, such as motions under 28 U.S.C. § 2255, grounded upon the Booker holding itself.

That is not at all the situation with a § 3582(c)(2) proceeding. Here, Booker did not provide the grounds for the filing. The § 3582(c)(2) motion is based upon a Sentencing Commission change to the Guidelines. Most importantly, a § 3582(c)(2) motion, if granted, can lead directly to a new sentencing calculation. And it is the event of the sentencing recalculation and a potential new sentence that brings up the question of whether and how Booker applies. And because Booker unequivocally states that district courts must no longer treat the Guidelines as mandatory, the new sentence as a result of the § 3582(c)(2) motion should take place under the advisory Guidelines scheme.

Finally, regardless of the merits of Hicks in view of Booker, Dunphy and Hicks conflict on an important issue that the Court should resolve. In Hicks, the Ninth Circuit concluded that because a district court that has granted a § 3582(c)(2) motion then engaging in re-sentencing a defendant, and because this Court has made clear that the advisory Guidelines now apply in any sentencing context, district courts have the authority to apply the advisory Guidelines in that circumstance. Hicks, 472 F.3d at 1171.

Dunphy rejected that argument and reached the opposite conclusion. The Fourth Circuit found that Booker applies to require application of the advisory Guidelines and consideration of 18 U.S.C. § 3553 in every sentencing situation except in § 3582(c)(2) proceedings because the Commission decided so. Dunphy, 551 F.3d at 253-54. "We find the Hicks analysis to be flawed because it fails to consider two marked characteristics of a § 3582(c)(2) proceeding * * *: (1) this proceeding allows only for downward adjustment and (2) this proceeding is not a full resentencing hearing." Id. at 254.

Because of the number of defendants this issue impacts, because the issue greatly impacts Mr. Shorter, and because the core of the matter appears to turn upon whether the Commission can limit a holding of this Court through amending the Guidelines, Mr. Shorter asks the Court to grant the petition and either remand with instructions or accept full and formal briefing on the matter.

## CONCLUSION

Defendant-Petitioner William Shorter, Jr. submits that his petition for writ should be granted for the compelling reasons noted above, and respectfully asks the Court to certify these issues for full briefing or, in the alternative, remand the matter to the Fourth Circuit or district with instructions that the district court grant him a full re-sentencing hearing or apply the advisory Guidelines, or both.

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